

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JOHN KERR, EDWARD LI,
TIM BARNARD, and KENNETH
CURTIS, individually and on behalf of
all others similarly situated,

Plaintiffs,

vs.

ZACKS INVESTMENT RESEARCH,
INC., an Illinois corporation,
NATIONAL MARKETING
RESOURCES, LLC, a Missouri limited
liability company; PARADIGM
DIRECT LLC, a Delaware limited
liability company; RESPONSE
NORTH, LLC, a Utah limited liability
company; ZACKS INVESTMENT
MANAGEMENT, INC. an Illinois
corporation; and DOES 6-50, inclusive,

Defendants.

CASE NO. 16-CV-01352 GPC BLM

**ORDER GRANTING
PRELIMINARY APPROVAL OF
SETTLEMENT AND PROVIDING
FOR NOTICE**

[DKT. NO. 108]

1 Pending before the Court is Plaintiffs' Unopposed Motion for Preliminary
2 Approval of Settlement ("Motion") relating to the settlement between plaintiffs John
3 Kerr ("Kerr"), Edward Li ("Li"), Tim Barnard ("Barnard"), Kenneth Curtis ("Curtis"),
4 (collectively, "Plaintiffs") and defendants Zacks Investment Management, Inc.
5 ("ZIM") and Zacks Investment Research, Inc. ("ZIR") (together, "Zacks"); Response
6 North, LLC ("Response North"); National Marketing Resources, LLC ("NMR"); and
7 Paradigm Direct LLC ("Paradigm") (collectively, "Defendants").¹ Dkt. No. 108. A
8 hearing was held as to this matter on November 9, 2017, where the Court ordered the
9 parties to submit supplemental briefing. Dkt. No. 113. On November 15, 2017,
10 plaintiffs filed a supplemental brief and revised Class Notices. Dkt. No. 115.

11 Having read and considered the moving papers, including the Settlement
12 Agreement, and finding good cause, the Court finds and orders as follows:

13 1. Based upon the Court's review of the Settlement Agreement, the Motion
14 (Dkt. No. 108), the supporting memorandum, the supporting declaration and attached
15 exhibits, Plaintiffs' Supplemental Briefing and the attached exhibits (Dkt. No. 115),
16 and the entire record, Plaintiffs' Unopposed Motion for Preliminary Approval of
17 Settlement is **GRANTED**.

18 2. The Court hereby conditionally certifies the following classes for
19 settlement purposes only (the "Classes"):

20 The "Zacks Class" is defined as follows:

21 "All natural persons nationwide who, between and including May
22 6, 2012 and June 30, 2017, received a telephone call that was
23 (1) made to their cellular telephone and (2) initiated by or on
24 behalf of ZIR or ZIM using an automatic telephone dialing
25 system. Excluded from the Zacks Class are all employees of
26 defendants, all employees of defendants' counsel, all employees
27 of plaintiffs' counsel, and judicial officers, their family members,
28 and court staff assigned to the Lawsuit."

26 ¹ Capitalized terms, not defined herein, have the same meaning as in the
27 Settlement Agreement (Dkt. No. 108-3).

1 The “Response North TCPA Class” is defined as follows:²

2 “All natural persons nationwide who received from Response
3 North a telephone call reflected in contact databases produced by
4 Response North, which (1) was placed as part of the Zacks Book
5 Campaign and/or the Options Trading Campaign and (2) was
6 received on a cellular telephone. Excluded from the Response
7 North TCPA Class are all employees of Response North, all
8 employees of Response North’s counsel, all employees of
9 plaintiffs’ counsel, and judicial officers, their family members,
10 and court staff assigned to the Lawsuit.”

11 The “Response North Privacy Class” is defined as follows:

12 “All California residents who received from Response North a
13 telephone call reflected in contact databases produced by
14 Response North, which (1) was made on a telephone line that was
15 subject to recording by Response North and (2) was received by
16 the recipient in the State of California. Excluded from the
17 Response North Privacy Class are all employees of Response
18 North, all employees of Response North’s counsel, all employees
19 of plaintiffs’ counsel, and judicial officers, their family members,
20 and court staff assigned to the Lawsuit.”

21 3. The Court finds, for settlement purposes only, that the Classes meet the
22 requirements for certification under Fed. R. Civ. P. 23(a) and 23(b)(3) in that: (i) the
23 Classes are so numerous that joinder is impracticable; (ii) there are questions of law
24 and fact that are common to all Class Members, which predominate over individual
25 issues; (iii) regarding typicality: (a) Kerr’s claims are typical of the claims of the
26 Response North TCPA Class and the Response North Privacy Class and (b) the claims
27 of Li, Barnard, Curtis, Cares, Johnson, and Abjanic are typical of the claims of the
28 Zacks Class; (iv) Kerr, Li, Barnard, Curtis, Cares, Johnson, Abjanic, and Class
Counsel will fairly and adequately protect the interests of the Classes; and (v) a class
action is superior to other available methods for the fair and efficient adjudication of

² As stated in Exhibit 1 to Plaintiff’s Supplemental Briefing, the Zacks Book Campaign refers to “certain telephone calls to the cellular telephones of certain individuals in connection with telemarketing efforts relating to a book published by ZIR.” The Options Trading Campaign refers to “certain telephone calls to the cellular telephones of certain individuals in connection with telemarketing efforts . . . relating to an educational seminar regarding options trading.” See Dkt. No. 115.

1 the controversy. The Court appoints Kerr as the representative of the Response North
2 TCPA Class and the Response North Privacy Class; Li, Barnard, Curtis, Cares,
3 Johnson, and Abjanic as the representatives of the Zacks Class; Dostart Hannink &
4 Coveney, LLP as Class Counsel; and CPT Group, Inc. as the Settlement
5 Administrator.

6 4. The Court preliminarily approves the Settlement, including the monetary
7 relief, procedure for payment of Class Counsel's attorneys' fees and litigation
8 expenses to the extent ultimately awarded by the Court, and procedure for payment of
9 class representative incentive awards to the extent ultimately awarded by the Court.
10 The Court has reviewed the monetary relief that has been provided as part of the
11 Settlement and recognizes its significant value to the Classes. It appears to the Court
12 on a preliminary basis that the Settlement is fair, adequate, and reasonable as to all
13 potential Class Members when balanced against the cost and uncertainty associated
14 with further litigation of liability and damages issues. It further appears that settlement
15 of the Litigation at this time will avoid substantial additional costs by all Parties, as
16 well as the delay and risks that would be presented by the further prosecution of the
17 Litigation. It also appears that the Settlement has been reached as a result of intensive,
18 serious, and non-collusive arm's-length negotiations.

19 5. The Court approves the Amended Summary Class Notices, the Amended
20 Publication Notice, and the Amended Long Form Class Notice, which are attached as
21 Exhibits 1-7 to the Supplemental Brief in Support of Plaintiffs' Unopposed Motion
22 for Preliminary Approval ("Supplemental Brief") (ECF No. 115). The Settlement
23 Administrator shall use for all purposes the Amended Notices (Exhibits 1-7 of the
24 Supplemental Brief), rather than the original notices (Exhibits A-F of the Settlement
25 Agreement). The Court approves the Claim Forms (Exhibits G and H to the
26 Settlement Agreement). The Court also approves the Parties' revised agreement, as
27 set forth in the Supplemental Brief, to publish the Amended Publication Notice three
28

1 times in the *Wall Street Journal*. Along with the foregoing, the notice procedure
2 described in the Settlement meets the requirements of Fed. R. Civ. P. 23 and due
3 process and constitutes the best practicable notice under the circumstances. The
4 Settlement Administrator is directed to distribute the Amended Summary Class
5 Notices via email or mail no later than thirty (30) days after entry of this Order, and
6 to take all steps necessary to establish a settlement website. The date on which the
7 Amended Summary Class Notices are emailed or mailed by the Settlement
8 Administrator is the “Notice Date.”

9 6. Any objections to the Settlement or to any of its provisions must be filed
10 with this Court and served upon Class Counsel, Defendants’ counsel, and the
11 Settlement Administrator no later than sixty (60) days following the Notice Date, or
12 else such objection will be waived.

13 7. As set forth in the Settlement, any Class Member who wishes to be
14 excluded from a Class shall mail, email, or personally deliver to the Settlement
15 Administrator a written request to be excluded no later than sixty (60) days following
16 the Notice Date. Individuals in the Classes who do not timely request exclusion shall
17 be bound by all determinations of the Court, the Settlement, and any Judgment that
18 may be entered thereon.

19 8. If they have not already done so, Zacks and Response North shall
20 promptly comply with the requirements of 28 U.S.C. § 1715.

21 9. The Parties shall file any motion for final approval, and Class Counsel
22 shall file its motion for attorneys’ fees, litigation expenses, and service payments to
23 Kerr, Li, Barnard, Curtis, Cares, Johnson, and Abjanic, on the dates required under
24 the Local Rules and under controlling law.

25 10. A final approval hearing shall be held in this Court on April 6, 2018, at
26 1:30 p.m., at which time the Court will determine whether the Settlement should be
27 granted final approval. At that time, the Court will also consider Class Counsel’s
28

1 motion for attorneys' fees, litigation expenses, and the proposed service payments to
2 Kerr, Li, Barnard, Curtis, Cares, Johnson, and Abjanic.

3 11. Any Class Member may appear at the Final Approval Hearing and object
4 to the Settlement ("Objectors"). Objectors may present evidence and file briefs or
5 other papers that may be proper and relevant to the issues to be heard and determined
6 by the Court. No Class Member or any other person shall be heard or entitled to
7 object, and no papers or briefs submitted by any such person shall be received or
8 considered by the Court, unless on or before the date that is sixty (60) days after the
9 original date of emailing or mailing of the Summary Class Notices, that person has
10 filed the objections, papers, and briefs with the Clerk of this Court and has served by
11 hand or by first-class mail copies of such objections, papers, and briefs upon Class
12 Counsel (Dostart Hannink & Coveney, LLP, Attention Zach P. Dostart, 4180 La Jolla
13 Village Drive, Suite 530, San Diego, California 92037) and Defendants' counsel
14 (Burke, Warren, MacKay & Serritella, P.C., Attention Danielle J. Gould, 330 North
15 Wabash Avenue, 22nd Floor, Chicago, Illinois 60611; Lewis Brisbois Bisgaard &
16 Smith LLP, Attention Stephen Turner, 633 West 5th Street, Suite 4000, Los Angeles,
17 California 90071; and Meylan Davitt Jain Arevian & Kim LLP, Attention Raymond
18 B. Kim, 444 South Flower Street, Suite 1850, Los Angeles, California 90071). Any
19 Participating Class Member who does not object in the manner provided for in this
20 order shall be deemed to have waived such objection and shall forever be foreclosed
21 from objecting to the Settlement.

22 12. If the Settlement does not become effective in accordance with the terms
23 of and as defined in the Settlement, or if the Settlement is not finally approved by the
24 Court, or is terminated, canceled or fails to become effective for any reason, this order
25 shall be rendered null and void and shall be vacated, and the Parties shall revert to
26 their respective positions before entering into the Settlement. Accordingly, if the
27 Settlement does not become effective for any reason: (i) the Settlement shall be null
28

1 and void and shall have no further force and effect with respect to any Party in this
2 Litigation, and shall not be used in this Litigation or in any other proceeding for any
3 purpose and (ii) all negotiations, proceedings, documents prepared, and statements
4 made in connection therewith shall be without prejudice to any person or Party hereto,
5 shall not be deemed or construed to be an admission by any Party of any act, matter,
6 or proposition, and shall not be used in any manner or for any purpose in any
7 subsequent proceeding in this Litigation, provided, however, that the termination of
8 the Settlement shall not shield from subsequent discovery any factual information
9 provided in connection with the negotiation of the Settlement that would ordinarily be
10 discoverable but for the attempted settlement.

11 13. The Court reserves the right to adjourn or continue the date of the Final
12 Approval Hearing and all dates provided for in the Settlement without further notice
13 to Class Members, and retains jurisdiction to consider all further matters arising out
14 of or connected with the proposed Settlement.

15 14. In accordance with the terms of the Settlement, the Court hereby adopts
16 the following dates for performance of the specified activities leading to the Final
17 Approval Hearing:

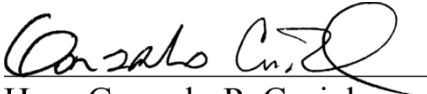
18 19 20 21 November 22, 2017	Deadline for Class Counsel to provide the Settlement Administrator with the Zacks Database and the Response North Database.
22 23 24 25 26 December 1, 2017	ZIR, ZIM, or their insurer shall transfer the sum of \$250,000.00 into an interest-bearing account administered by the Settlement Administrator. Response North or its insurer shall transfer the sum of \$200,000.00 into an interest-bearing account administered by the Settlement Administrator.

December 18, 2017	<p>Deadline for Settlement Administrator to email or mail the Summary Class Notices to all persons listed in the Zacks Database and the Response North Database. This is the “Notice Date.”</p> <p>Deadline for Settlement Administrator to establish a website on which it will make available the operative complaint, the Settlement Agreement, the order granting preliminary approval of the Settlement, a Long Form Class Notice, the Zacks Claim Form (in a format that may be printed), the Response North Claim Form (in a format that may be printed), and any other materials agreed to by the Parties.</p> <p>The date on or after which the Settlement Administrator will cause the Publication Notice to be published in the Wall Street Journal (may be within 3 days after the Notice Date).</p>
February 16, 2018	Claim/Exclusion/Objection Deadline; Last day for Class Members to submit a Claim; Last day for Class Members to submit a request for exclusion or to file and serve any written objection to the Settlement and any notice of intent to appear at Final Approval Hearing
March 2, 2018	Deadline for Claims Administrator to provide to Class Counsel and Defendants’ counsel a written report summarizing the Claims that have been received and the Claims that have been validated, and listing any request for exclusion or objection that has been received by the Settlement Administrator.
April 6, 2018 at 1:30 PM	Final Approval Hearing

15. The parties are ordered to carry out the Settlement in the manner provided in the Settlement.

1 **IT IS SO ORDERED.**

2
3 Dated: November 17, 2017


Hon. Gonzalo P. Curiel
United States District Judge

4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28